UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SAMUEL CRUZ,

Plaintiff,

-against-

SILVANO MARCHETTO,

Defendant,
Third-Party Plaintiff,

-against-

GARAGE MANAGEMENT CORPORATION,

Third-Party Defendant.

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11 Civ. 8378

OPINION

A P P E A R A N C E S:

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Plaintiff Samuel Cruz ("Cruz" or the "Plaintiff") has moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the counterclaims and affirmative defenses of the defendant Silvano Marchetto ("Marchetto" or the "Defendant"). Third-party defendant Garage Management Corporation ("GMC" or the "Third-Party Defendant") has moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the third-party complaint of Marchetto.

Based upon the conclusions set forth below, both motions are granted.

I. Prior Proceedings

The Plaintiff filed his initial complaint on November 18, 2011 alleging six causes of action, including two claims of unlawful employment practices under the New York City Administrative Code, battery, assault, intentional infliction of emotional distress and false imprisonment.

Invoking Rules 12(b)(6), 12(b)(1) and 20(a) of the Federal Rules of Civil Procedure, the Defendant moved to dismiss the entirety of the initial complaint on December 22, 2011. On February 8, 2012, the motion to dismiss was heard and granted as to the first, second and sixth causes of action (the "February 8 Order"). The Plaintiff was granted 20 days to replead. (Id.).

On February 23, 2012, the Plaintiff filed his amended complaint (the "AC") alleging battery, assault and intentional infliction of emotional distress. The Defendant filed his amended answer with counterclaims on March 30, 2012 (the "AA"). The AA asserted affirmative defenses of failure to state a claim, third-party liability for any damages, the doctrine of unclean hands, and failure to act. The AA also alleged that the Plaintiff (1) defamed the Defendant and (2) intentionally inflicted emotional distress.

On April 9, 2012, the Plaintiff moved to dismiss the counterclaims and affirmative defenses. The motion was heard and marked fully submitted on May 16, 2012.

On March 20, 2012, the Defendant filed his third-party complaint ("TPC") against GMC pursuant to Rules 14 and 18(a) of

the Federal Rules of Civil Procedure. The TPC alleged that GMC (1) defamed the Defendant; (2) intentionally inflicted emotional distress; (3) was liable for damaged under the doctrine of respondeat superior; and (4) was negligently supervising its employee.

On May 30, 2012, GMC moved to dismiss the TPC pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The motion was marked fully submitted on June 27, 2012.

II. The Facts

The facts are taken from the AC, the AA, the TPC and the affidavits submitted by the parties.

Cruz is a resident of the State of New Jersey, County of Essex. At all relevant times, Cruz worked as a manager and employee of a parking garage on 122 West 3rd Street, New York, New York, which is owned by GMC. GMC is a corporation organized and existing under the laws of New York and maintains a principal place of business at 124 East 63rd Street, New York, New York.

Marchetto is an individual residing in the County of New York in the State of New York. Marchetto was a customer of and maintained a monthly contract with GMC, from which he leased parking spaces for the purpose of parking his four vehicles.

In early October 2011, Marchetto pulled his 2008 Ferrari into the GMC parking garage, in which Cruz worked. Marchetto instructed Cruz to get someone to give him a ride to his restaurant Da Silvano Restaurant, located at 260 6th Avenue, New York, New York.

According to the AC, "upon information and belief," if Marchetto did not want a particular employee working for GMC, GMC would immediately terminate that employee. Cruz alleges that he was scared and apprehensive to disobey Marchetto out of fear of being retaliated against by GMC. Thus, Cruz arranged for a ride for Marchetto. However, right before Marchetto got into the car, Marchetto turned around and rubbed Cruz' genital area with his hand. Cruz alleges that he immediately objected, to which Marchetto merely smiled and jumped into the car. Cruz claims that the touching was uninvited and unwanted and that he was shocked and horrified by the act.

On October 28, 2011, Marchetto pulled his 2008 Ferrari into the GMC garage in which Cruz worked. According to the AC, Marchetto again reached out his hand and began to rub, hold on to, and refused to let go of Cruz' gentials. Cruz alleges that he was in real fear for his personal safety and demanded that Marchetto stop and let go of his genitals. According to Cruz, he never stopped trying to fight back and get away from Marchetto. Once Marchetto released Cruz' genitals, Cruz was able to escape and reported the incident to his supervisors at GMC.

According to the AC, Cruz was violated, humiliated and embarrassed. He also felt physically repulsed, disgusted and intimidated by the alleged contact with Marchetto.

The AA alleges that Marchetto would tip approximately one hundred dollars each time a GMC parking employee parked his car. Eventually, Marchetto reduced his tip to all GMC employees parking his car to fifty dollars. According to the TPC and the AA, Cruz was angered by the reduction in his tip amount and targeted Marchetto because he was the owner of a popular restaurant. Marchetto alleges that, in filing the AC, Cruz falsely, maliciously and wrongfully intended to injure and

destroy his good name, fame and reputation. In addition, the TPC alleges that Cruz engaged in repeated and ongoing attempts to "shake down" garage patrons for money, advancement, and personal benefit.

Articles reporting the alleged incident were published in various news outlets, including three articles in the New York Post, Gothamist and New York Magazine. They include: (1) a New York Post article dated January 23, 2012 titled "Da Silvano owner accused of sexual assault claims he's too old to grope"; (2) a New York Post article dated November 19, 2011 titled "'Grope' claim a $$ grub: Da Silvano Owner"; (3) a New York Post article dated November 19, 2011 titled "Da Silvano owner accused of groping parking-garage manager"; (4) an article in the Gothamist dated November 19, 2011 titled, "Da Silvano Owner Accused of Repeated Unwanted Groping"; and (5) a quote from an article in New York Magazine dated November 21, 2011 stated, "An extra layer of icky has been added his reputation . . ." According to Marchetto, the publication of these statements have jeopardized his reputation and standing and he has sustained financial loss in his industry.

III. The Applicable Standard

In considering a motion to dismiss pursuant to Rule 12(b)(6), the Court construes the complaint liberally, accepting all factual allegations as true and drawing all reasonable inferences in the plaintiff's favor. Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993). The issue "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 378 (2d Cir. 1995) (quoting Scheuer v. Rhodes, 416 U.S. 232, 235-36, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)).

To survive dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Plaintiffs must allege sufficient facts to "nudge[ ] their claims across the line from conceivable to plausible." Twombly, 550 U.S. at 570. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Cohen v. Stevanovich, 772 F.

Supp. 2d 416, 423 (S.D.N.Y. 2010). Though the court must accept the factual allegations of a complaint as true, it is "not bound to accept as true a legal conclusion couched as a factual allegation." Iqbal, 556 U.S. at 678. (quoting Twombly, 550 U.S. at 555).

IV. Discussion

The Defamation Claim Against the Plaintiff is Dismissed

The AA alleges defamation arising out of statements made in connection with this litigation. Under New York law, to prevail on a defamation claim, the claimant must establish the following elements: "(i) a defamatory statement of fact concerning the plaintiff, (ii) publication to a third party by the defendant, (iii) falsity of the defamatory statement, (iv) some degree of fault, and (v) special damages or per se actionability (defamatory on its face)." Daniels v. St. Luke's-Roosevelt Hosp. Center, No. 02-9567(KNF), 2003 WL 22410623, at *4 (S.D.N.Y. 2003).

Marchetto baldly asserts that he has satisfied the pleading requirements in order to establish a cause of action

for defamation. Citing to Daniels v. Alvarado, No. 03-5832(JBW), 2004 WL 502561 (E.D.N.Y. Mar. 21, 2004), he contends that "the plaintiff is not required to plead a defamation action in these words or with specificity" and that "the particular words complained of . . . may be stated generally." Id. at *7. However, Daniels is a pre-Twombly case and Marchetto cannot rely on the less stringent pleading standard and apply it to his case.

Here, Marchetto has failed to allege facts to satisfy the elements for a claim of defamation. First, Marchetto has not alleged that Cruz made any false statements. The AA mentions specific articles in the New York Post, the Gothamist and New York Magazine reporting on the instant case (AA ¶ 40). These statements, however, do not reference or assert any factual statements made by Cruz. Instead, the articles restate and summarize the claims alleged by the AC or appear to report on statements made by Marchetto.

Similarly, Marchetto alleges in a conclusory manner that Cruz made statements that ended up in the headlines and quoted in the media (AA ¶ 40) and that "Cruz knew that these statements were and are false." (AA ¶ 41). Without

substantiation, Marchetto deduces that the statements were made "in reckless disregard of their truth or falsity." (Id.). Thus, Marchetto attempts to satisfy the elements of defamation without offering any specific details about the allegedly defamatory statements, including when, where or in what manner they were made.

When a party fails to specifically claim "when, where, or in what manner the statements were made," then a claim for defamation may be dismissed for failure to state a claim. Davison v. Goodwill Industries of Greater New York and Northern New Jersey, Inc., No. 10-2180 (DLI)(RLM), 2012 WL 1067955, at *4 (E.D.N.Y. Mar. 28, 2012); see also Leung v. New York Univ., No. 08-5150(GBD), 2010 WL 1372541, at *8 (S.D.N.Y. Mar. 29, 2010) (dismissing defamation claims where the complaint lacked specificity as to the content of the defamatory statements and to the time, place and manner in which they were uttered); Dellefave v. Access Temporaries, Inc., No. 99-6098(RWS), 2001 WL 25745, at *3 (S.D.N.Y. Jan. 10, 2001) (finding that the "deductions included in the pleadings are insufficient to state a claim" as are "pleadings which require deductions in order to state all the elements."). Here, Marchetto has not pled that

Cruz published any statements to the various media outlets with specificity nor demonstrated any fault on Cruz' part.

In addition, parties to a litigation have an "absolute privilege . . . for defamatory statements made prior to, in the institution of, or during the course of, a proceeding." Long v. Marubeni America Corp., 406 F. Supp. 2d 285, 294 (S.D.N.Y. 2005) (quoting ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS, § 8.2.1.4 at 8-14 (2004)). This privilege is limited and "usually understood as not applying . . . to out-of-court statements made to persons not related to the litigation." Id. (quoting RODNEY SMOLLA, LAW OF DEFAMATION, § 8:9 at 8-12.4 (2nd ed. 2005)). However, out-of-court statements are still privileged "to the extent that they represent fair and true reports of what occurred in the proceeding" with an exception for a party's out-of-court repetition of a maliciously false statement in a pleading. Id. at 295.

The allegations of defamation in this case involve statements from the lawsuit itself and reports made in connection with the litigation in various news outlets, including some that offer the author's opinion of the matter (AA ¶ 39-40). There is no evidence that Cruz offered any of the

alleged statements to the media, nor any facts demonstrating Cruz' malicious intent if he did so. While the AA alleges that Cruz "showed actual malice, spite and ill-will toward plaintiff, in filing the complaint" and intended "to have to have the allegations publicized widely." (Id. ¶ 42). Such allegations are merely conclusory assertions and deductions, that do not overcome the privilege or demonstrate malice. See Davison, 2012 WL 1067955, at *3 ("Plaintiff's defamation claim is largely premised on conclusory statements and deductions, which this court need not credit as true when evaluating a motion to dismiss.").

Accordingly, Marchetto's defamation claim against Cruz is dismissed.

The Intentional Infliction of Emotional Distress Claim Against the Plaintiff is Dismissed

Under New York law, the tort of intentional infliction of emotional distress is comprised of four elements: "(1) extreme and outrageous conduct, (2) intent to cause severe emotional distress, (3) a causal connection between the conduct and the injury, and (4) severe emotional distress." Cabrera v. N.Y.C., 436 F. Supp. 2d 635, 646-47 (S.D.N.Y. 2006) (quoting

Bender v. City of New York, 78 F.3d 787, 790 (2d Cir. 1996)). The "requirements of the rule are rigorous, and difficult to satisfy." PROSSER AND KEETON, TORTS § 12, at 60-61 (5th ed. 1984). The conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Naughright v. Weiss, 826 F. Supp. 2d 676, 697 (S.D.N.Y. 2011) (quoting Sheila C. v. Povich, 11 A.D.3d 120, 130-131, 781 N.Y.S.2d 342 (1st Dep't 2004)).

According to the AA, Cruz "engaged in ongoing and constant abuse" of Marchetto during the course of his employment at GMC. (AA ¶ 48). The AA also alleges that "conduct in making defamatory statements about Defendant Marchetto, with knowledge that there existed no basis in fact for such false statements and with the knowledge and intention that Defendant would suffer severe emotional distress as a result, was so outrageous in character and so extreme in degree as to offend all standards of civilized conduct." (AA ¶ 49).

As discussed above, Marchetto has failed to plead facts establishing Cruz as a source of any alleged defamatory

statements. Regardless, even assuming Cruz made the statements to the news outlets and that they are defamatory, they fall well short of meeting the high standard for extreme and outrageous conduct. See Carlson v. Geneva City School Dist., 679 F. Supp. 2d 355, 372 (W.D.N.Y. 2010) (finding that "[d]efamatory statements are generally not sufficiently extreme and outrageous to support an [intentional infliction of emotional distress] claim."); see also Peterec-Tolino v. Commerical Elec. Contractors, Inc., No. 08-0891(RMB)(KNF), 2009 WL 2591527, at *1 (S.D.N.Y. Aug. 19, 2009) (stating that a state court granted a motion to dismiss because, among other reasons "a claim for the intentional infliction of emotional distress may not be maintained to the extent that the damages sought are duplicative of those sought in the defamation claim.").

Furthermore, Marchetto's bare assertions as to Cruz' conduct merely tracks the language of the elements of the claim. This is "precisely the type of conclusory allegation which the Court is not required to credit on a motion to dismiss." House v. Wackenhut Servs., No. 10-9476(CM)(FM), 2011 WL 6326100, at *5 (S.D.N.Y. Dec. 16, 2011).

Accordingly, the intentional infliction of emotional distress claim is dismissed.

The Affirmative Defenses in the AA are Dismissed

Marchetto's first affirmative defense asserts that the AC fails to state a claim upon which relief can be granted. (AA ¶ 27). However, this issue has been litigated in the February 8 Order, which dismissed certain claims but retained battery, assault and intentional infliction of emotional distress as causes of action.

The second affirmative defense alleges that "[i]f there is a debt, it is owned jointly by" Cruz and GMC, so that GMC should be liable for Marchetto's damages. (AA ¶ 28). This claim is discussed and denied below.

The third affirmative defense alleges that Cruz' claims are barred by the doctrine of unclean hands. (AA ¶ 29). Under New York law, the doctrine of unclean hands is "never used unless the plaintiff is guilty of immoral unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party

seeking to invoke the doctrine was injured by such conduct." MBIA Ins. Corp. v. Patriarch Partners VIII, LLC, 842 F. Supp. 2d 682, 712 (S.D.N.Y. 2012). In addition, the defense "cannot be asserted against claims involving money damages." Scalera v. Electrograph Sys., Inc., 848 F. Supp. 2d 352, 374 n.14 (E.D.N.Y. 2012); Herman v. Nat'l Enter. Sys., Inc., No. 07-337, 2008 WL 4186321, at *11 (W.D.N.Y. Sept. 10, 2008) (finding the affirmative defense of unclean hands "wholly irrelevant" to plaintiff's claims involving money damages.). Despite Marchetto's attempt to argue that Cruz seeks equitable relief in this case, the AA clearly seeks compensatory and punitive monetary damages. (AC ¶ 46 C-D).

The fourth affirmative defense alleges that Cruz' claims are "barred by virtue of [his] own actions or inactions." (AA ¶ 30). In essence, Marchetto argues that Cruz should have in some way prevented the sexual assault alleged to have been perpetrated against him by either acting or failing to act. Construing this affirmative defense generously, it amounts simply to a general denial for which there is no supporting authority.

Taken together, all of the affirmative defenses are dismissed.

The Claims Against GMC in the TPC Are Dismissed

The first two causes of action alleged in the TPC allege defamation and intentional infliction of emotional distress. (TPC ¶¶ 8-23). In the TPC, Marchetto does not allege that GMC made any defamatory statements or that GMC engaged in any conduct that intentionally inflicted emotional distress upon him. Instead, the TPC expressly alleges that the causes of action are based on Cruz' conduct, and does not allege that GMC approved of, authorized, was aware of, or was in any way involved with Cruz' decision to bring his lawsuit or any information that was relayed to the various news outlets (Id.).

In addition, as to the defamation claim, the TPC, like the claim against Cruz in the AA, fails to state any specific details about when, where, or in what manner such statements were made. Without these details, the TPC does not give GMC the sufficient notice needed to defend against the complaint. See Leung, 2010 WL 1372541, at *8. Therefore, the TPC lacks the

required specificity with respect to the allegedly defamatory statements.

With respect to the intentional infliction of emotional distress claim, Marchetto's allegations involve only Cruz' conduct and mentions GMC merely to state that "GMC is liable of the resulting intentional infliction of emotional distress of Defendant/ Third-Party Plaintiff Marchetto." (TPC ¶ 23). As such, under the Twombly/ Iqbal pleading standard, Marchetto has failed to set forth allegations that, even if true, would lead to a plausible liability finding against GMC for either claims and the defamation and intentional infliction of emotional distress causes of action are dismissed.

The TPC asserts a third cause of action for respondeat superior, alleging that GMC is liable for the damages caused by its agents and employees including Cruz. (TPC ¶¶ 24-39). An employer is liable under respondeat superior if the employee, in committing the act complained of, was acting within the scope of his employment. See Restatement (Third) of Agency § 2.04; see also Perks v. Town of Huntington, 251 F. Supp. 2d 1143, 1166 (E.D.N.Y. 2003) (stating that an employer can only "be held vicariously liable for a defamatory statement made by one of its

employees, but only if the employee made the statement in the course of performance of [his] duties."). Marchetto contends that during the course of Cruz' employment, GMC failed to supervise his actions, which allowed for Cruz' to allegedly engage in ongoing "shake-downs" of Marchetto and other garage patrons. (TPC ¶¶ 28-29). Marchetto alleges that Cruz' actions always occurred during working hours and thus within the course and scope of his employment. (Id. ¶¶ 29-36). He also argues that "GMC was aware of this conduct but failed to investigate the matter." (Id. ¶ 35).

In determining whether an employee is engaged in conduct within the scope of his employment, the following factors are relevant:

> "(1) whether the employee's act fell within the discretion and control of the employer; (2) whether the employee acted under the express or implied authority of the employer; (3) whether the employee's act was in furtherance of the employer's interests; (4) whether the employee's acts were in the 'discharge of duty' to the employer; (5) whether the act was in execution of the employer's orders or part of the work assigned by the employer; and (6) whether the acts were 'so closely connected' with what the employee was hired to do, and 'so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of employment.'"

Perks, 251 F. Supp. 2d at 1166. There is also "no respondeat superior liability for torts committed for personal motives unrelated to the furtherance of the employer's business." Murray v. Watervliet City School Dist., 130 A.D.2d 830, 515 N.Y.S.2d 150, 152 (N.Y.A.D. 3rd Dep't 1987).

Weighing the factors set forth above, Marchetto has not demonstrated that Cruz' conduct occurred within the scope of his employment. For example, Cruz' alleged statements and actions fell outside of the control of GMC, did not advance GMC's interest of retaining customers nor was his conduct closely connected with why Cruz was hired. Marchetto has not set forth a claim for defamation by respondeat superior because the alleged statements made by Cruz to the media are not alleged to fall within the job description of a garage employee or GMC's business.

While not the subject of a 12(b)(6) motion, the Court in Perk was faced with comparable claims. In that case, one employee of the Town of Huntington brought a sexual harassment and defamation lawsuit against a Huntington councilwoman. The plaintiff alleged that in retaliation for bringing the suit, the councilwoman had penned a letter of false accusations and sent

it to the media. He also asserted that the Town of Huntington was vicariously liable for the councilwoman's statements. The Court concluded that, even construing the facts in the light most favorable to the plaintiff, no reasonable jury could find that the councilwoman was acting within the scope of her employment when she contacted the media. Id. at 1167.

In addition, as discussed above, Marchetto has failed to plead the requisite extreme and outrageous conduct necessary to state a claim for intentional infliction of emotional distress. See James v. DeGrandis, 138 F. Supp. 2d 402, 421 (W.D.N.Y. 2001) (finding that false charges of sexual harassment do not rise to the level of outrage required to recover under intentional infliction of emotional distress). There are no facts alleged in the TPC as to GMC on this cause of action.

Finally, the TPC alleges negligent supervision. (TPC ¶ 40-51). To state a claim for negligent supervision or retention under New York law, in addition to the standard elements of negligence, a plaintiff must show: "(1) that the tort-feasor and the defendant were in an employee-employer relationship; (2) that the employer 'knew or should have known of the employee's propensity for the conduct which caused the

injury' prior to the injury's occurrence; and (3) that the tort was committed on the employer's premises or with the employer's chattels." Ehrens v. Lutheran Church, 385 F.3d 232, 235 (2d Cir. 2004) (citations omitted).

Here, there is no dispute that Cruz and GMC were in an employer-employee relationship or that any alleged tort was committed on the employer's premises. Even construing Marchetto's claim broadly, however, there are no facts plead showing that GMC knew or had any reason to know that Cruz had a propensity for committing the alleged torts. For example, Marchetto does not claim that he or any other customer made any complaints to GMC about Cruz, which went ignored. Without any facts supporting that GMC had knowledge of Cruz' tendency or propensity for bad conduct, Marchetto's claim fails. Tatum v. City of New York, No. 06 Cv. 4290(BSJ)(GWG), 2009 WL 124881, at *10 (Jan. 20, 2009) (dismissing the plaintiff's claim where he failed to "ma[ke], let alone substantiat[e], any . . . allegations" that the defendant knew or should have known of a corrections officer's propensity to commit injury).

In addition, the TPC alleges that Cruz "frequently used vehicles of garage patrons to transport other patrons to

their destinations without the permission of the owners of the vehicles," that he "frequently brought his friends into the garage while not actually working and/or authorized to access the vehicles of garage patrons," and "solicited money from garage patrons . . . separate from the business of the garage." (TPC ¶¶ 41-43).

It is unclear from the TPC if these are the torts Cruz is alleged to have committed, and if so, no facts support causation or how Marchetto suffered an injury. Marchetto also confusingly states that GMC should be held liable because they did not conduct an investigation Cruz' complaints of assault and battery (TPC ¶ 46).

Accordingly, the four claims against GMC in the TPC are dismissed.

V. Conclusion

Based upon the conclusions set forth above, the Plaintiff's motion to dismiss the counterclaims and affirmative defenses of the Defendant is granted.

In addition, the third-party defendant GMC motion to dismiss the TPC is granted. The Plaintiff is granted leave to replead the TPC within 20 days.

It is so ordered.

New York, NY
September 28, 2012

ROBERT W. SWEET
U.S.D.J.